FOR ARGUMENT

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No. 89-1363 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES,

Petitioner,

v.

DARLINA K. FRANCE,

Respondent.

REPRINTED COPY

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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A. Magistrate Voir Dire Violates Article III And Also Constitutes Plain Error.

The recent First Circuit case of *United States* v. *Martinez-Torres*, Slip op. No. 87-2006 (1st Cir. Aug. 20, 1990) (en banc) (1990 WL 120629), which reversed the earlier panel decision in *United States* v. *Lopez-Pena*, 890 F.2d 490 (1st Cir. 1989) (withdrawn),[1] supports the conclusion that magistrate voir dire, even if consented to, violates the structural requirements of Article III. In addition, the case confirms that magistrate voir dire constitutes, in the words of Fed. R. Crim. P. 52(b), a "defect[] affecting [a] substantial right[]."

In *Martinez-Torres*, the First Circuit held that the defendants' convictions must be reversed, notwithstanding a failure to object, because the error in having the magistrate select the jury was "plain." In reaching this conclusion, the court reasoned from *Gomez* that "[i]f empaneling the jury is a 'critical stage of a criminal trial' [as *Gomez* held] and there is no one with 'jurisdiction to preside,' surely this 'affects the fairness, integrity and public reputation' of the proceedings." Slip op. at 9. To hold otherwise, suggested the court, would permit a judge "to absent[] himself from the trial some morning to attend to other business and appoint [] an able clerk to preside, provided that the clerk's evidentiary rulings were within discretionary limits." *Id.* If, as *Martinez-Torres* concludes, a magistrate who is without jurisdiction to preside at jury selection is the same as "a man or woman taken off the street, *id.*," or, in the words of the government, is the same as "a panel of citizens," it is difficult to understand how the structural safeguards of Article III have been met. After all, Section 1 of that

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[1] The government had relied on *Lopez-Pena* in its opening brief (Br. 6, 14, 15, 26).

Article demands that "the judicial power of the United States *shall* be vested" (emphasis added) in courts whose judges shall have life tenure and whose salaries shall not be diminished.[2] A man or woman from the street, a Harvard law professor, or a panel of citizens, however learned, would not satisfy these requirements.

Having been charged with a federal crime in federal district court, and having elected a jury trial, respondent, *as well as the public*, was entitled to the nonwaivable structural safeguards of Article III.[3] Moreover, contrary to the government's assertion (Reply Br. 12), Article III *does* create a different rule for criminal and civil trials. Indeed, Article III, § 2, Cl. 3 expressly guarantees the right to a jury trial *only* in a criminal case, not a civil case. Consequently, unlike in a civil trial, respondent may not waive the structural requirement of an Article III Judge at a critical stage of her criminal trial.

The government argues that jury selection by a magistrate does not violate Article III because, as in the case of the pre-trial suppression hearing in *United States* v. *Raddatz*, 447 U.S. 667 (1980), "the Article III judge was available to review the magistrate's conduct of the voir dire and make the ultimate decision whether an impartial jury had been selected." Reply Br. 13. The government's argument is not sound because it overlooks this Court's unanimous observation in *Gomez* that, unlike in the case of a pre-trial suppression hearing, the Court "harbor[s] serious doubts that a district judge [can] review [jury selection by a magistrate]." *Gomez*, 109 S. Ct. at 2247. Therefore, even if the Article III Judge is, in Justice

[2] Moreover, pursuant to Article II, § 2, such officers must also be nominated by the President and approved by the Senate.

[3] Federal courts have exclusive jurisdiction over crimes against the United States. 18 U.S.C.A. § 3231.

Blackmun's words, "waiting in the wings," he is *not* "fully able to correct the errors." *Raddatz*, 447 U.S. at 686 (Blackmun, J., concurring).[4]

Moreover, meaningful review of the many complex and subtle decisions involved in selecting an impartial jury, some of which were outlined by this Court in *Gomez*, 109 S. Ct. at 2247, is highly doubtful. Hence, since correction of errors is not realistic, an Article III judge, practically speaking, does not make the "ultimate decision" respecting selection of the jury. Under the reasoning of *Raddatz*, however, such "ultimate decision" making is a prerequisite to the constitutionality of any delegation of authority to a magistrate. *Raddatz*, 447 U.S. 667, 638. By delegating to the magistrate, a person without jurisdiction, the critical and virtually unreviewable function of jury selection in a felony case, the Article III judge stripped himself of an "essential attribute[]" of judicial power. *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 59, 81 (1982) (plurality opinion) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932)). Therefore, the delegation in the instant case violated Article III.[5]

[4] *See Northern Pipeline* 458 U.S. at 91 (Rehnquist, J., concurring) (because bankruptcy court resolves matters "in the first instance" and because there is only "traditional appellate review," such courts are not adjunct courts and therefore court's adjudication of this lawsuit is violative of Art. III).

[5] For similar reasons the delegation also violates due process of law. In *Raddatz*, this Court reasoned that having a magistrate conduct the suppression hearing does not violate due process because at such a pre-trial hearing the due process interests are of "lesser magnitude" than those at "the criminal trial itself" and because district judges have the responsibility to make an "informed" review of the magistrate's decisions. *Raddatz*, 447 U.S. at 679-82. The case at bar, by

B. Respondent's Failure To Object To Magistrate-Conducted Voir Dire In The Instant Case Did Not Constitute A Knowing Consent To The Procedure.

Martinez-Torres also held that a defendant's mere failure to object to magistrate-conducted voir dire did not constitute his knowing consent to the procedure. *Martinez-Torres*, Slip op. at 8. In reaching its conclusion, the First Circuit relied on this Court's unanimous opinion in *United States* v. *Gomez*, 109 S. Ct. 2237 (1989) and on Congress' insistence upon a defendant's written consent to have a magistrate preside at a misdemeanor trial. It rejected as a "radical jump" the bald conclusion of some courts that the absence of an objection itself constituted the necessary consent. Slip op. 10. The court reasoned, much as respondent did (Br. 39-46), that "the statutory concept of requiring defendant's written consent, even for a misdemeanor trial, necessarily negated waiver, even oral consent, by counsel for an *uninformed* defendant in a felony case." Slip op. 10 (emphasis added).

The Ninth Circuit had reached a similar conclusion a few days earlier in an opinion written by Judge Noonan, and held that any waiver of the right to have an Article III judge select a jury in a felony case had to be evidenced by the defendant's "specific written consent." *United States* v. *Aikins*, Slip op. No. 88-1369 (9th Cir., Aug. 15, 1990) (1990 WL 116872); *see also United States* v. *Lake*, Slip op. No. 89-2852 (7th Cir., Aug. 10, 1990) (1990 WL 113862)

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contrast, concerns a "critical" stage of the trial itself. *Gomez*, 109 S. Ct. at 2248. Moreover, the decisions made at this critical stage are not susceptible of meaningful review. *Id.* Respondent does concede, however, that the due process violation, unlike the Article III violation, can be waived. As argued in the opening brief (Br. 39-46), however, any such waiver must be express, knowing and intelligent as it was in *Lake*, *infra*. No such waiver occurred in the instant case.

(consent valid where magistrate "carefully explained" to the defendant the consequences of the defendant's personal choice to have a magistrate select the jury); *cf. United States* v. *Teague*, 908 F.2d 752 (11th Cir. 1990) (defendant's right to testify must be waived personally by defendant, not by counsel).

In the instant case there was no explanation on the record of any kind given to respondent of her right to have an Article III Judge conduct jury selection. Nor did she give any oral, much less written, consent to have the magistrate select the jury. Thus the judgment below may be affirmed on this ground,[6] and the Court need not reach any of the other more complex issues raised by respondent.

C. Objection Was Futile And/Or Excusable.

In *Martinez-Torres* the First Circuit, reasoning along the lines of the Ninth Circuit's opinion in *France* below, held that in light of the prevailing law within the First Circuit, as well as nationwide, failure of the defense to object to magistrate voir dire was "entirely excusable." Slip op. 7. In reaching this conclusion, the court analyzed its prior decision in *United States* v. *Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983), and the prevailing law in other circuits

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[6] In its reply brief the government argued that respondent's personal consent to magistrate conducted voir dire was unnecessary because the jury selection was merely "a preliminary proceeding that was subject to de novo review by the court at her request." Reply Br. 16. However, both premises of this argument were unanimously rejected by this Court in *Gomez*. First, jury selection is not a mere preliminary procedure, but rather a "critical" stage of the trial. *Gomez*, 109 S. Ct. at 2248. Second, "meaningful" de novo review of the many subtle and complex decisions that must be made at jury selection is simply not possible. *See Gomez*, 109 S. Ct. at 2247.

at the time the jury was selected in *Martinez-Torres*. The court found, just as respondent has argued (Br. 16, n.8), that *Rivera-Sola* had voiced "unreserved approval" of magistrate-conducted voir dire, Slip op. 6, and that *Rivera-Sola* represented a "clear endorsement" of the practice. *Id.* The Court reasoned that *Rivera-Sola* did not provide the defense attorneys in *Martinez-Torres* "with reasonable hope that they might persuade the Puerto Rico [federal district] court to jettison its time-saving rule." *Id.*

Indeed, according to the court, to require objection under such circumstance would only encourage "obnoxiously belligerent counsel, who, in spite of history, or ignorant thereof, object to everything as a matter of principle. . . ." Slip op. 7. This is much the same view taken by the Ninth Circuit, Pet. App. 10a, and by respondent. *See* Br. 22-24 (to force counsel to make futile objections in the hope, however remote, that the prevailing law might be overturned would "open the floodgates both at trial and on appeal to meritless claims" and overwhelm an already overburdened judiciary).[7]

Finally, in its reply brief the government concedes that "[i]n the case of a contention that counsel knows neither the court of appeals nor this Court is likely to accept, it is entirely reasonable for counsel to forgo raising it. . . ." [Reply Br. 6] This describes much the same situation that faced respondent's counsel at the time of jury selection in the instant case. Accordingly, the government's concession disposes of the issue.

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[7] The court also noted, as respondent argued (Br. 18), that the defendants' failure to raise the issue on appeal until after *Gomez* was decided was "a full answer to the government's sometime suggestion that defendants [were sandbagging]." Slip op. 3.

In any event, the case for excusing respondent's failure to object in the case at bar is much stronger than in *Martinez-Torres* for two reasons. First, in the latter case the dissent quarrelled with the majority's conclusion that *Rivera-Sola* had rendered future defense objection futile. The dissent argued that the Circuit's approval of magistrate-conducted voir dire in *Rivera-Sola* was mere dictum. Slip op. 22 (Selya, J., dissenting). Agreeing with the majority, however, the dissent pointed to the Ninth Circuit as an example of a true "solid wall" of adverse precedent. *See* Slip op. at 22 ("[I]n this circuit, unlike in the Ninth, there was no 'solid wall' [of adverse circuit authority]"). Therefore, *Martinez-Torres* strongly supports affirmance of the judgment of the Ninth Circuit with respect to futility.

Second, based apparently on government representations made for the first time at oral argument, the dissent in *Martinez-Torres* asserted that in the district of Puerto Rico, notwithstanding *Rivera-Sola*, the district judges "frequently selected jurors themselves." Slip op. 28 (Cambell, J., dissenting). In stark contrast, within the District of Hawaii, as shown by respondent and as pointed out by the government, magistrates selected the jury in "virtually all" cases regardless of objection. Pet. Cert. 3, 7; Resp. Br. 23. Indeed, notwithstanding the government's most recent assertion that Hawaii "did not invariably" assign jury selection to magistrates (Reply Br. 5), the government fails to cite a single case in the District of Hawaii, after the Ninth Circuit's "solid wall" was erected, in which a defendant's objection caused a district judge, instead of a magistrate, to select the jury. This failure confirms the Ninth Circuit's assessment in *France* that objection by respondent below would have been futile.

Respectfully submitted,

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